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Ho Shen Lee (M) Sdn Bhd & Ors v Lim Shen Lee

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(NCC)(A)-760–04 OF 2019
MOHAMAD ZABIDIN, AZIZAH NAWAWI AND LEE HENG CHEONG JJCA
28 SEPTEMBER 2022

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Companies and Corporations — Winding up — Petition — High Court allowed respondent's winding up petition against first appellant — Appellants appealed against decision of High Court — Whether respondent had established grounds in petition that warranted winding up order — Companies Act 2016 s 465(1)(f) & (h)

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This was an appeal against the decision of the learned High Court judge in allowing the respondent's winding up petition ('the petition'). The first appellant was incorporated under the Companies Act 1965. The shareholders of the first appellant were the second appellant (51% shares), the respondent (46% shares) and one Wong Tee Ming ('TM Wong') held a minority 3% shareholding. The directors of the first appellant were the second and third appellants, the third appellant being the wife of the second appellant. The respondent was a former director of the first appellant. There were three other companies ('related companies') related to the first appellant namely: (a) TNL Plastic Manufacturer Sdn Bhd; (b) HSL Chemical (M) Sdn Bhd; and (c) HSL Auto Engineering Sdn Bhd. An extraordinary general meeting ('EGM') was held and attended by the respondent, the second appellant and TM Wong. The sole purpose of the EGM was to pass an ordinary resolution to appoint the third appellant as a director of the first appellant. The ordinary resolution for the appointment of the third appellant as a director of the first appellant was passed by a majority vote despite the respondent's objection. After the appointment of the third appellant, there was a change of signatories for the operation of financial banking accounts of the first appellant. Prior to that, the signatories were the respondent and the second appellant. Subsequently, the respondent was removed as a director of the first appellant. The respondent had commenced winding up proceedings against the first appellant and the related companies. The High Court allowed the petition and hence this appeal.

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Held, allowing the appeal:

(1) The purported initial oral agreement between the respondent and the second appellant was nothing more than a bare assertion which had not been substantiated by any evidence. The learned judge had no basis in

concluding that the appointment of the third appellant as a director was contrary to the unproven initial oral agreement or that such appointment was in bad faith. Secondly, the sum of RM700,000 that was deposited into the first appellant was not to increase the authorised and paid-up share capital but instead utilised as working capital. The alleged non-disclosure of the RM700,000 was a non-issue because there was no dissipation of the said sum and it could not be relied on as a basis to wind up the first appellant. Regarding the change of signatories for the operation of financial banking accounts of the first appellant, this was purely a management decision to enable the smooth operations of the related companies. The respondent had failed to show that as a result of the change of bank signatories, the second and third appellants had acted in their own interests or acted in a manner that was unfair or unjust to the respondent. Lastly, the complaint regarding the purchase of the vehicles for the second and third appellants was baseless and frivolous as this was an internal management matter. The respondent had failed to explain how such purchase of vehicles was in any unfair or unjust to the members of the first appellant and therefore failed to satisfy the test under s 465(1)(f) of the Companies Act 2016 ('the CA 2016') (see paras 31, 36, 38, 40, 42–43 & 51).

(2) The respondent's issuance of the notices to the banks requiring the banker not to allow the operation of the financial accounts of the first appellant and also the related companies was in bad faith as this had resulted in the disruption of the first appellant's operations. Secondly, it was obvious that the appellants had never refused to provide the requested company documents to the respondent. Further, a purported refusal to provide company documents by itself was insufficient to justify winding up a company when the respondent could have availed himself to an application under s 245 of the CA 2016 to inspect the accounting and other records of a company. Thirdly, the removal of the respondent as director was a management decision of the majority members of the first appellant and was in compliance with the law and CA 2016. Added to that, the respondent had failed to come to court with clean hands in light of the breach of his fiduciary duties in conspiring with Pembinaan Nilai Setia Sdn Bhd to defraud and injure against the first appellant, which justified and necessitated his removal as director. There was no evidence whatsoever to support the respondent's allegation that there had been a total loss of confidence in the conduct and management of the affairs of the first appellant as a result of him being removed as director and the appointment of the third appellant as a director. Lastly, without a proper valuation, the second appellant and TM Wong were justified in their rejection of the respondent's offer as the respondent's selling price for his shares in the related companies were entirely exorbitant and baseless (see paras 59, 65–66, 76–77 & 84).

(3) The respondent had failed to establish any of the grounds in the petition, either individually or cumulatively, in order to invoke the court's discretion to issue the winding up order against the first appellant pursuant to s 465(1)(f) and (h) of the CA 2016. The learned judge had made a fundamental error when he failed to ascertain whether the grounds in the petition had been established that warranted a winding up order (see paras 86–87).

(4) The appellants had established that the first appellant was a reputable and well-established company. Apart from conspiring with Pembinaan Nilai Setia Sdn Bhd to defraud and injure the related companies, including the first appellant, the respondent had also acted against the interests of the first appellant by issuing a notice which caused the bank to freeze the accounts of the first appellant. Such acts/actions of the respondent were evidence of the respondent's lack of good faith in filing the petition. The respondent had failed to come with clean hands before the court seeking to wind up the first appellant (see paras 97 & 106).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam membenarkan petisyen penggulungan responden ('petisyen'). Perayu pertama telah diperbadankan di bawah Akta Syarikat 1965. Pemegang saham perayu pertama ialah perayu kedua (51% saham), responden (46% saham) dan seorang Wong Tee Ming ('TM Wong') memegang minoriti 3% pegangan saham. Pengarah perayu pertama ialah perayu kedua dan ketiga, perayu ketiga ialah isteri perayu kedua. Responden adalah bekas pengarah perayu pertama. Terdapat tiga lagi syarikat ('syarikat berkaitan') yang berkaitan dengan perayu pertama iaitu: (a) TNL Plastic Manufacturer Sdn Bhd; (b) HSL Chemical (M) Sdn Bhd; dan (c) HSL Auto Engineering Sdn Bhd. Mesyuarat agung luar biasa ('MALB') telah diadakan dan dihadiri oleh responden, perayu kedua dan TM Wong. Tujuan tunggal MALB adalah untuk meluluskan resolusi biasa untuk melantik perayu ketiga sebagai pengarah perayu pertama. Resolusi biasa untuk pelantikan perayu ketiga sebagai pengarah perayu pertama telah diluluskan dengan undi majoriti walaupun responden membantah. Selepas pelantikan perayu ketiga, terdapat pertukaran penandatangan bagi pengendalian akaun perbankan kewangan perayu pertama. Sebelum itu, penandatangan adalah responden dan perayu kedua. Selepas itu, responden telah disingkirkan sebagai pengarah perayu pertama. Responden telah memulakan prosiding penggulungan terhadap perayu pertama dan syarikat berkaitan. Mahkamah Tinggi membenarkan petisyen dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Perjanjian lisan awal yang dikatakan antara responden dan perayu kedua adalah tidak lebih daripada satu penegasan kosong yang tidak dibuktikan

oleh sebarang keterangan. Hakim yang bijaksana tidak mempunyai asas untuk membuat kesimpulan bahawa pelantikan perayu ketiga sebagai pengarah adalah bertentangan dengan perjanjian lisan awal yang tidak dibuktikan atau bahawa pelantikan tersebut adalah dengan niat jahat. Kedua, jumlah RM700,000 yang didepositkan ke dalam perayu pertama bukan untuk menambah modal saham dibenarkan dan berbayar sebaliknya digunakan sebagai modal kerja. Dakwaan ketidakdedahan RM700,000 adalah bukan isu kerana tiada pelesapan jumlah tersebut dan ia tidak boleh bergantung sebagai asas untuk menggulung perayu pertama. Mengenai pertukaran penandatangan untuk pengendalian akaun perbankan kewangan perayu pertama, ini adalah semata-mata keputusan pengurusan untuk membolehkan operasi lancar syarikat berkaitan. Responden telah gagal menunjukkan bahawa akibat pertukaran penandatangan bank, perayu kedua dan ketiga telah bertindak untuk kepentingan mereka sendiri atau bertindak dengan cara yang tidak adil atau tidak saksama kepada responden. Akhir sekali, aduan berhubung pembelian kenderaan untuk perayu kedua dan ketiga adalah tidak berasas dan remeh kerana ini adalah urusan pengurusan dalaman. Responden telah gagal menjelaskan bagaimana pembelian kenderaan sedemikian adalah tidak adil atau tidak saksama kepada ahli perayu pertama dan oleh itu gagal memenuhi ujian di bawah s 465(1)(f) Akta Syarikat 2016 ('AS 2016') (lihat perenggan 31, 36, 38, 40–42, 43 & 51).

(2) Pengeluaran notis responden kepada bank yang menghendaki jurubank tidak membenarkan pengendalian akaun kewangan perayu pertama dan juga syarikat berkaitan adalah dengan niat jahat kerana ini telah mengakibatkan gangguan operasi perayu pertama. Kedua, adalah jelas bahawa perayu tidak pernah menolak untuk memberikan dokumen syarikat yang diminta kepada responden. Selanjutnya, keengganan yang dikatakan untuk menyediakan dokumen syarikat dengan sendirinya tidak mencukupi untuk mewajarkan penggulungan syarikat apabila responden boleh memohon permohonan di bawah s 245 AS 2016 untuk memeriksa rekod perakaunan dan rekod lain syarikat. Ketiga, penyingkiran responden sebagai pengarah adalah keputusan pengurusan majoriti ahli perayu pertama dan mematuhi undang-undang dan AS 2016. Selain itu, responden telah gagal untuk hadir ke mahkamah dengan suci hati memandangkan pelanggaran kewajipan fidusiarinya dalam bersekongkol dengan Pembinaan Nilai Setia Sdn Bhd untuk menipu dan mencederakan perayu pertama, yang mewajarkan dan memerlukan penyingkirannya sebagai pengarah. Tiada apa-apa bukti untuk menyokong dakwaan responden bahawa telah berlaku kehilangan keyakinan sepenuhnya terhadap pengendalian dan pengurusan hal ehwal perayu pertama akibat dipecat sebagai pengarah dan pelantikan perayu ketiga sebagai pengarah. Akhir sekali, tanpa penilaian yang sewajarnya, perayu kedua dan TM Wong adalah wajar dalam menolak tawaran

responden kerana harga jualan responden untuk sahamnya dalam syarikat berkaitan adalah terlalu tinggi dan tidak berasas (lihat perenggan 59, 65–66, 76–77 & 84).

(3) Responden telah gagal untuk membuktikan mana-mana alasan dalam petisyen itu, sama ada secara individu atau kumulatif, untuk menggunakan budi bicara mahkamah untuk mengeluarkan perintah penggulungan terhadap perayu pertama menurut s 465(1)(f) dan (h) AS 2016. Hakim yang bijaksana telah membuat kesilapan penting apabila gagal memastikan sama ada alasan dalam petisyen itu telah dibuktikan yang memerlukan perintah penggulungan (lihat perenggan 86–87).

(4) Perayu-perayu telah membuktikan bahawa perayu pertama adalah sebuah syarikat yang bereputasi dan mantap. Selain bersubahat dengan Pembinaan Nilai Setia Sdn Bhd untuk menipu dan mencederakan syarikat berkaitan termasuk perayu pertama, responden juga telah bertindak bertentangan dengan kepentingan perayu pertama dengan mengeluarkan notis yang menyebabkan bank membekukan akaun perayu pertama. Perbuatan/tindakan responden tersebut adalah bukti ketiadaan suci hati responden dalam memfailkan petisyen. Responden telah gagal untuk hadir dengan suci hati di hadapan mahkamah untuk menggulung perayu pertama (lihat perenggan 97 & 106).]

Cases referred to

Dato' Ting Check Sii v Marine Utama Sdn Bhd & Anor [2013] 9 MLJ 527; [2013] 1 LNS 1351, HC (refd)

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492; [1973] AC 360, HL (refd)

Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors [2006] 4 MLJ 421, HC (refd)

Foo Yin Shung & Ors v Foo Nyit Tse & Brothers Sdn Bhd [1989] 2 MLJ 369; [1989] 1 CLJ Rep 552, HC (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 8 CLJ 775, CA (refd)

Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors [2007] 1 MLJ 508, CA (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Litar Sistem Adilkap Sdn Bhd v Lee Teak Hock & Anor [2020] 5 MLJ 43; [2020] 7 CLJ 84, CA (refd)

Loch v John Blackwood Ltd [1924] AC 783, PC (refd)

Morgan Guaranty Trust Co Of New York v Lian Seng Properties Sdn Bhd [1991]

A 1 MLJ 95; [1991] 1 CLJ Rep 317; [1991] 1 CLJ 260, SC (refd)
Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors [2010] 5 MLJ 342, CA (refd)
Tai Hean Leng @ Tek Hean Leng v New Future Capital Sdn Bhd [2018] MLJU 1599; [2018] 1 LNS 1647, HC (refd)
B *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318, FC (refd)
Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (M) Sdn Bhd [2002] 3 MLJ 674; [2002] 3 CLJ 741, CA (distd)
C *Wong Ah Chau v WBW Engineering & Construction Sdn Bhd* [2015] MLJU 479, HC (folld)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 218(1)(f), (1)(i)
D Companies Act 2016 ss 245, 465, 465(1)(f), (1)(h)

Appeal from: Winding Up Petition No NA-28NCC-30–06 of 2018 (High Court, Seremban)

E *Lim Kian Leong (with Annou Xavier, Yong Jia Wei and Sonia Chan Siu Yuen) (Azri, Lee Swee Seng & Co) for the appellant.*
Lim Kien Huat (with Tang Keen Cheong) (Lee & Lim) for the respondent.

Azizah Nawawi JCA:

F INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge delivered on 11 April 2019, allowing the respondent's winding up petition
G dated 12 June 2018 ('petition').

[2] Having considered the appeal records and the submissions of the parties, we have allowed the appellants' appeal and these are the grounds of our decision.

H SALIENT FACTS

[3] The first appellant was incorporated on 30 September 2022 under the Companies Act 1965 with a paid-up capital of RM1.3m. The shareholders of
I the first appellant are the second appellant (51% shares), the respondent (46% shares) and one Wong Tee Ming held a minority 3% shareholding ('TM Wong').

[4] The directors of the first appellant are the second and third appellants, the third appellant being the wife of the second appellant. The respondent was a former director of the first appellant.

[5] There are three other companies ('related companies') related to the first appellant namely:

(a) TNL Plastic Manufacturer Sdn Bhd ('TNL Plastic');

(b) HSL Chemical (M) Sdn Bhd ('HSL Chemical'); and

(c) HSL Auto Engineering Sdn Bhd ('HSL Auto').

[6] The shareholding of the parties are common in the related companies. The second appellant held 51% shareholding, the respondent held 46% shareholding and TM Wong held the balance 3% shareholding.

[7] On 5 July 2017, an extraordinary general meeting ('EGM') was held and attended by the respondent, the second appellant and TM Wong. The sole purpose of the EGM was to pass an ordinary resolution to appoint the third appellant as a director of the first appellant company.

[8] The ordinary resolution for the appointment of third appellant as a director of the first appellant company was passed by a majority vote despite the respondent's objection.

[9] After the appointment of the third appellant, there was a change of signatories for the operation of financial banking accounts of the first appellant. Prior to that, the signatories were the respondent and the second appellant.

[10] Subsequently, the respondent was removed as a director of the first appellant company.

[11] In June 2018, the respondent had commenced winding up proceedings against the first appellant and the related companies, which are as follows:

(a) against TNL Plastic in Seremban High Court Companies Winding Up No NA-28NCC-29–06 of 2018 ('Petition No 29');

(b) against Ho Shen Lee, the first appellant in Petition No 30; and

(c) against HSL Auto in Seremban High Court Companies Winding Up No NA-28NCC-31–06 of 2018 ('Petition No 31').

[12] The common complaints raised by the respondent in all three petitions are as follows:

(a) the appointment of the third appellant as a director of the first appellant company and the related companies, TNL Plastics and HSL Auto;

(b) the change of signatories for the operation of financial banking accounts of the three related companies;

(c) no disclosure from the second appellant on the whereabouts of the balance of RM700,000 in the first appellant and the sum of RM300,000 in TNL Plastics;

(d) further enquiry from the respondent asking for the audited accounts in the respective companies;

(e) the respondent sought for the Companies Commission of Malaysia's assistance to investigate the three companies;

(f) argument between the respondent and the second appellant leading to the respondent to lodge the police report;

(g) the respondent as the guarantor for the first appellant and TNL Plastics;

(h) removal of the respondent as a director from the first appellant and the related companies, TNL Plastics and HSL Auto;

(i) irretrievably breakdown in relationship amongst the shareholders and the subsequent picketing and protest in front of the respondent's house on 30 March 2018; and

(j) as against the first appellant, the refusal of the second appellant to buy the respondent's shares in the related companies and no dividend to the first appellant shareholders in year 2017.

[13] The learned judge hearing Petition No 29 and 31 had dismissed the said petitions, resulting in the following appeals by the respondent, as the appellant:

(a) Civil Appeal No N-02(NCC)(A)-1149–06 of 2019 ('Appeal No 1049') for Petition No 29; and

(b) Civil Appeal No N-02(NCC)(A)-1050–06 of 2019 ('Appeal No 1050') for Petition No 31.

[14] In contrast and notwithstanding the similarity in evidence, the learned judge hearing Petition No 30 had allowed the same, resulting in the present appeal herein.

[15] By an order dated 17 August 2020, all three appeals were directed to be heard together by reason of similar parties, facts and legal issues arising in all three appeals.

[16] This court had allowed this appeal, and consequently had dismissed Appeal No 1049 and Appeal No 1050.

THE DECISION OF THE HIGH COURT

[17] The learned High Court judge did not articulate on the law relied upon by the respondent in the petition, nor did he address the issue as to whether the grounds in the petition had been proven to justify the order of winding up the first appellant company.

[18] In fact, the learned High Court judge only dealt with two issues that were raised by the appellants (respondents in the petition):

(a) bahawa pentadbiran syarikat berjalan lancar tanpa gangguan dan perniagaan berjalan juga baik. Sekiranya Mahkamah membenarkan Lampiran 1 Permohonan Pempetisyen ianya akan menjejaskan mata pencarian pekerja-pekerja.

(b) Tomahan Pempetisyen bersubahat dengan Pembinaan Nilai Setia untuk mencederakan Syarikat Responden.

[19] The learned judge's findings on the two issues are as follows:

Keputusan mahkamah atas jawapan isu (a) responden-responden

[29] Mahkamah ini masih bergantung kepada peruntukkan s 564 Akta Syarikat 2016 atas perkataan 'just and equitable' dan kes yang berkaitan adalah kes *Varusay Mohamed Shaikh Abdul Rahman v SVK Patchee Brothers (M) Sdn Bhd* [2002] 1 MLRA 42 di mana Mahkamah Rayuan memutuskan sebagai berikut:

> We are of the view that since the learned judge did not at all direct his mind to the settled principles and the relevant facts of the case, in particular the statement of S02, it tantamount to a non-direction. And further, the learned judge in exercising his discretion has manifestly proceeded on a wrong ground, because on decided authorities the fact that the company is an on-going concern and is capable of making profits has never been considered as a factor that falls within the ambit of the expression 'just and equitable'. The same consideration goes for the fact of undue hardship to workers because practically all business enterprises must employ workers, whether many or few, who will in any event suffer undue hardship as the result of the winding up. In *Re Yenidje Tobacco Company Limited* (1916) 2 Ch D 426, the company was wound up in spite of it continuing to transact business and large profits were made. And in *In Re Westbourne Galleries*, the company though made good profits all of which were distributed as directors' remunerations nevertheless was wound up.

Keputusan mahkamah atas jawapan isu (b) responden-responden

[30] Alegasi terdapat pakatan antara pempetisyen dengan syarikat Pembinaan Nilai Setia [PNS] tidak dapat dibuktikan oleh responden-responden ianya hanya alegasi semata-mata. lni berdasarkan bahawa pempetisyen tidak mempunyai apa-apa kuasa dan kepentingan di dalam syarikat PNS itu. Beliau bukannya memegang apa-apa saham dan bukannya Pengarah syarikat PNS tersebut.

[31] Dengan ini Lampiran 1 pempetisyen dibenarkan dengan kos.

OUR DECISION

[20] The petition was premised on ss 465(1)(f) and (h) of the Companies Act 2016 ('the CA 2016'), which reads as follows:

465 Circumstances in which company may be wound up by Court

(1) The Court may order the winding up if —

...

(f) the directors have acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members;

...

(h) the Court is of the opinion that it is just and equitable that the company be wound up; ...

Winding up pursuant to s 465(1)(f)

[21] Pursuant to s 465(1)(f) of the CA 2016, a company may be wound up in the event that the directors had acted in the affairs of the company for their own interest rather than the interests of the members as a whole or in any manner unjust or unfair to members.

[22] Section 465(1)(f) of the CA 2016 is in *pari materia* with s 218(1)(f) of the Companies Act 1965 ('the CA 1965').

[23] Section 218(1)(f) of the CA 1965 has been interpreted by Peh Swee Chin J (as he then was) in *Foo Yin Shung & Ors v Foo Nyit Tse & Brothers Sdn Bhd* [1989] 2 MLJ 369; [1989] 1 CLJ Rep 552 where His Lordship said this:

Section 218(1)(f) has two limbs — the first limb containing the phrase, inter alia, 'interests of members as a whole' and the second, the phrase, inter alia, 'unfair and unjust to other members'.

About the phrase 'interests of members as a whole', I have adopted respectfully the

> interpretation of Bowen CJ in Equity of New South Wales Supreme Court in *Re Cumberland Holdings Ltd* [1976] 1 ACLR 361 that the phrase means a *situation where directors are shown to have preferred their own interests to the interests of one, or more or perhaps some significant section of the members so that the action of directors may be open to challenge notwithstanding that it coincides with the interests of the majority shareholder.* The test in connection with such challenge seems to be that the said s 218(1)(f) or para (f) applies *when the directors are seen not to have been acting in the interests of all the members and cannot be said therefore to have been acting in the interests of members as a whole.*
>
> It will be seen therefore that the scope of the para (f) is very wide indeed, it can cover a great number of situations which would lie outside, eg s 181 of the Companies Act 1965 in connection with 'oppression' or 'disregard' as judicially explained in a number of reported cases in Malaysia, notably *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227; [1978] 1 LNS 170 (PC). (Emphasis added.)

[24] As to the second limb of para (f) regarding the phrase 'unjust or unfair to members', Peh Swee Chin J considered that it should also be subject to equitable considerations, of a nature described by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492 at p 500, as:

> ... considerations that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[25] As such, s 465(1)(f) is not expressed to be predicated upon conduct that is unlawful or illegal but is based on the standard of the directors' conduct, that is to be viewed from the perspective of whether it was 'unfair' or 'unjust'.

[26] Therefore, in order to establish his case, the respondent must raise serious allegation against the second and third appellants, in that they had acted against the interests of the company and were only concerned with their own benefits. The onus is on the respondent to establish the grounds/complaints raised in the petition, either individually or cumulatively, in order to seek the court's discretion to make the winding up order.

[27] In the present appeal, with regard to s 465(1)(f) of the CA 2016, the grounds in the petition as submitted by the respondent in their written submission are as follows:

(a) the appointment of the third appellant as a director of the first appellant company;

(b) no increase in authorised and paid up capital of the first appellant company;

(c) change of signatories for the operation of financial banking accounts of the first appellant company; and

(d) purchase of vehicles for the second and third appellants.

The appointment of the third appellant as a director of the first appellant company

[28] The appointment of third appellant as a director was by way of identical resolutions all dated 5 July 2017 in all related companies, including the first appellant.

[29] However, it is the contention of the respondent that the appointment of the third appellant was against an initial oral agreement between the respondent and the second appellant before setting up the first appellant company, that their wives shall not hold any position or be part of the first appellant company. This bare assertion by the respondent was accepted by the learned judge in para [9] of his judgment:

> [9] EGM tersebut dihadiri oleh responden kedua, WT Ming dan pempetisyen sendiri yang terdiri sebagai ahli-ahli syarikat responden. Resolusi ini adalah berlawanan dengan persetujuan secara mulut pada awalnya antara pempetisyen dan responden kedua sebelum penubuhan syarikat responden bahawa isteri masing tidak akan memegang apa-apa kedudukan atau dijadikan sebahagian di dalam syarikat responden.

[30] Hence, the respondent submitted that the appointment of the third appellant, who is a non-shareholder of the first appellant as a director and enjoying the benefit of the entitlement, is entirely against the benefit and interest of the members of the first appellant company as a whole.

[31] We are of the considered opinion and we agree with the appellants that the purported initial oral agreement between the respondent and the second appellant is nothing more than a bare assertion which had not been substantiated by any evidence.

[32] Added to that, the appellants have given credible affidavit evidence that prior to her appointment as a director, the third appellant had been assisting both the respondent and the second appellant with managing the related companies' administrative and accounting works since June 2012, and was remunerated for her services without any complaint from the respondent. Exhibit 'TKM4' is the company general ledger which shows the salaries paid to the third appellant, being the administrator and subsequently a director of the first appellant. This evidence was not considered by the learned trial judge, who made a finding that the third appellant '... dilantik sebagai pekerja di Syarikat

Responden semata-mata untuk menerima gaji bulanan sahaja dari syarikat tanpa sebarang penglibatan beliau menguruskan syarikat'. A

[33] Further, even after the third appellant's appointment as a director in July 2017 and prior to the presentation of Petition No 30 on 16 July 2018, the respondent did not raise any complaint against the third appellant being paid her director fees of RM5,000 every month for 11 months. B

[34] It is also not in dispute that the resolution to appoint the third appellant was passed by majority vote (including the vote of TM Wong as the minority shareholder) and is in full compliance with the memorandum and articles of association ('M&A') of the first appellant. The minutes of the EGM, exh 'TKM5' shows that the respondent did not raise any objection to the appointment of the third appellant. The said minutes states 'there was no questions raised by the members'. C D

[35] In *Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors* [2010] 5 MLJ 342 this court held that:

> [40] LSL's *complaints comprise mainly matters within the internal management of a company incorporated under the Companies Act 1965.* Granting and withdrawal of perks to directors, company executives or employees are purely regulated within the company itself. Issuance of shares within a company as well as *appointment and removal of directors are also matters to be decided and implemented by the company itself according to its memorandum and articles of association (M & A), either by the board of directors or the shareholders in general meeting*. There are sufficient guidelines and rules to follow as provided in the M & A itself as well as in the relevant provisions of the Companies Act 1965 and the Companies Regulations. In making these decisions, generally, the majority rules. It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interest, that s 181 can be invoked. Persons who join a company (as shareholder) must learn to accept majority rule. (Emphasis added.)

E F G

[36] In the circumstances, we are of the considered opinion and we agree with the appellants that the learned judge had no basis in coming to the conclusion that the appointment of the third appellant as a director was contrary to the unproven initial oral agreement or that such appointment was in bad faith as he did at paras [7]–[13] of his judgment. Bearing in mind that the appointment of the third appellant as a director is an internal management issue, we find that the respondent had failed to satisfy the test under s 465(1)(f) of CA 2016 to show that the third appellant had in any way acted against the interest of or had been unjust or unfair to the members of the first appellant company by her appointment as director. H I

No increase in authorised and paid up capital of the first appellant company

[37] In his petition, the respondent had pleaded that the sum of RM700,000 from a joint account held by the respondent and the second appellant was to be used to increase the authorised and paid up share capital in the first appellant. However, the first appellant's paid up capital till date still remains and there is no increase and/or allotment of any new ordinary shares to the existing shareholders. The respondent submitted that there was no disclosure from the appellants with regard to the said RM700,000.

[38] However, we are of the considered opinion that the sum of RM700,000 that was deposited into the first appellant was not to increase the authorised and paid up share capital. The said amount was instead utilised as working capital, with each directors' contribution acknowledged in the financial accounts of the first appellant, whereby a sum of RM322,000 or 46% of RM700,000 is acknowledged to be due to the respondent in proportion with his shareholding or contribution in the first appellant. Exhibit 'TKM-6' is a copy of the general ledger dated 16 March 2018 which shows the amount owing to the respondent, the second appellant and TM Wong respectively.

[39] In paras [15]–[18] of his judgment, the learned judge narrated the respondent's complaints but he did not make any specific findings on this issue. In para [18], he made reference to the same issue being raised in Petition No 29 (TNL Plastic), but the learned judge hearing Petition No 29 found no wrongdoing on the part of the appellants and had dismissed the respondent's petition.

[40] In the premise, we are of the considered opinion that the alleged non-disclosure of the RM700,000 is a non-issue because there was no dissipation of the said sum, as the same was utilised as working capital and it cannot be relied on as a basis to wind up the first appellant company.

Change of signatories for the operation of financial banking accounts of the first appellant company

[41] It is the contention of the respondent that immediately after the appointment of the third appellant, by two directors' written resolutions signed on the 11 July 2017 by the second and the third appellants to change the signatories of the first appellant company for the operation of financial accounts with the financial institutions to include the third appellant. Prior to that, the signatories are both the respondent and the second appellant.

[42] We are of the considered opinion and we agree with the appellants that this was purely a management decision to enable the smooth operations of the

related companies. In any event, the only change to the bank signatory was the addition of the third appellant after her appointment as director. Even as at 11 July 2017, the respondent still remains as a bank signatory of the first appellant.

[43] As the change in the signatories was a management decision, we find that the respondent had failed to show that as a result of the change of bank signatories, the second and third appellants had acted in their own interests or acted in a manner that was unfair or unjust to the respondent. We find that this complaint is an internal management matter of the first appellant and this court will not interfere in such matter. In *Soh Jiun Jen*, this court held as follows:

> [42] The rule in *Foss v Harbottle* [1843] 2 Hare 461 has laid down a well-known principle which has resulted from the refusal of the court to interfere in the management of a company at the instance of a minority of its members who are dissatisfied with the conduct of the company affairs by the majority or by the board of directors. The court, under the pretext of minority protection under s 181, should be slow from interfering or enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs. *It cannot be the function of the court to take management decisions and to substitute its opinions for those of the directors and the majority of the members. If the thing complained of is a thing which in substance the majority of the company are entitled to do in accordance with the relevant rules and regulations then it is only prudent that a meeting of the members be called and ultimately let the majority get their wishes.* The justification for the rule is the need to preserve the right of the majority to decide how the company's affairs shall be conducted (see *Lord v Governor & Co of Copper Miners* [1848] 2 Ph 740 at p 751 and *Harben v Phillips* [1883] 23 Ch D 14 at p 39 — per Cotton LJ). (Emphasis added.)

[44] However, the learned judge had made a finding in paras [21]–[22] of his judgment that salaries of the second and third appellants, together with two other employees were allegedly drastically raised after the change of signatories.

[45] Having considered the petition, we find that this issue was not a pleaded complaint in the petition, nor was any evidence led in support. It is trite that the respondent is confined to the grounds raised in his petition and in his petition the respondent's only complaint was the change in the signatories. There was no allegation that the change in signatories led to a drastic increase in the salaries.

Purchase of vehicles for the second and third appellants

[46] After receiving two copies of the resolutions on the purchase of the vehicles, the respondent wrote a letter dated 25 August 2017 to the first appellant company stating that he will not sign the purchase resolutions until

and unless there is a frank and full discussion by the Board of Directors of the appellant company pertaining to the purpose for the purchase of the two vehicles, the benefit to the appellant company, the market price of the two vehicles and the consideration of all other options for the purchase of similar vehicles to the two vehicles has been made.

[47] However, instead of receiving any information, the respondent received a letter from the first appellant company dated 13 September 2017, signed by the second appellant informing him that the purchase resolutions had been passed and approved by majority of the directors on 22 August 2017.

[48] It is therefore the submission of the respondent that instead of declaring and paying dividend to all its shareholders, the second and the third appellants had purchased the two vehicles. Such conduct, according to the respondent, is clearly in the interests of the second and third appellants rather than in the interests of the member of the appellant company as a whole and/or in a manner that is unfair and/or unjust to the respondent as the contributory of the first appellant company.

[49] The main thrust of the respondent's complaint is that he was purportedly oppressed when he was not given 'full and frank disclosure' as to the purchase of the vehicles by the appellants through the resolutions dated 25 August 2017.

[50] However, the appellants have explained that the purchase of the vehicles was for the purpose of transportation means for both the second and third appellants in their respective capacities in the first appellant and were purchased at a reasonable market price.

[51] We are of the considered opinion that this complaint is baseless and frivolous as this is an internal management matter. In any event, the respondent had failed to explain how such purchase of vehicles is in any unfair or unjust to the members of the appellant company and therefore fails to satisfy the test under s 465(1)(f) of CA 2016.

Winding up pursuant to s 465(1)(h)

[52] The respondent's application to wind up the first appellant is also premised on s 465(1)(h) of the CA 2016, that it is just and equitable that the first appellant company be wound up.

[53] There is no definitive approach to the categories of 'just and equitable'. What is just and equitable varies from case to case. Thus, a company may be wound up where it is just and equitable that it should be wound up: *Gulf*

Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 8 CLJ 775.

[54] The meaning of 'just and equitable' is found in the case of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) where it was stated by Lord Wilberforce:

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be sleeping members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

[55] The common examples of when this jurisdiction has been invoked is where there is a deadlock in management (see *Dato' Ting Check Sii v Marine Utama Sdn Bhd & Anor* [2013] 9 MLJ 527; [2013] 1 LNS 1351); or where there is a breakdown in mutual trust and confidence amongst the shareholders (see *Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (M) Sdn Bhd* [2002] 3 MLJ 674; [2002] 3 CLJ 741; *Tai Hean Leng @ Tek Hean Leng v New Future Capital Sdn Bhd* [2018] MLJU 1599; [2018] 1 LNS 1647).

[56] However, in applying the 'just and equitable' ground, this court is reminded of the decision of the Federal Court in *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318 where the Federal Court had stated:

> [92] The just and equitable jurisdiction must be exercised carefully and judiciously, with special regard for the irreversible and drastic nature of a winding up as a court-ordered remedy (see *Perennial (Capitol) Pte Ltd & Anor v Capitol Investment Holdings Pte Ltd* [2018] 1 SLR 763.

[57] In the present appeal, the respondent's complaint under sub-s 465(1)(h) of the CA 2016 is that it is just and equitable to wind up the first appellant based on the following grounds:

(a) respondent as guarantor for the first appellant company;

(b) the second and third appellants have purportedly refused to provide copies of the audited accounts and company resolution to the respondent;

(c) respondent had been removed as director from the first appellant; and

(d) refusal to buy the respondent's 46% shares.

Respondent as guarantor for the appellant company

[58] Subsequent to the change of the signatories of the first appellant with the banks to the second and third appellants, the respondent had issued notices dated 18 September 2017 to the banks and Alliance Bank Malaysia Bhd notifying of the same and requiring the banker not to allow the operation of the financial accounts of the first appellant company and also the related companies. These notices to the banks were with the instructions to suspend all bank transactions in respect of the related companies on the basis that, amongst others, to prevent allegedly unauthorised future financial transactions of the related companies as the respondent was purportedly a guarantor for the related companies' loans with the banks.

[59] However, only CIMB Bank Bhd acted on the said notice. This had caused CIMB Bank to freeze the account of the first appellant, despite the fact that the respondent does not act as a guarantor for any loan with CIMB Bank. As such, we agree with the appellants that the respondent's issuance of the notices was in bad faith as this had resulted in the disruption of the first appellant's operations, which affected its ability to make payments to its creditors and service its loans, which would have increased the first appellant's risk of default.

[60] In both Petitions No 29 and 31, the learned judge found that the respondent had come to court with unclean hands in misrepresenting to the banks which caused a freeze of TNL Plastic and HSL Auto's bank accounts and amounts to a breach of fiduciary duties.

[61] In the present appeal, the learned judge had narrated the respondent's complaint in para [26] of the judgment and held that the respondent '… adalah penjamin bank-bank pinjaman oleh Syarikat Responden'. The learned judge however has failed to appreciate that the respondent had issued the complaint notice to CIMB, despite the fact that he was not a guarantor for any loans with CIMB Bank. This had caused CIMB Bank to freeze the account of the first appellant, which had caused disruptions to the first appellant's daily operations.

Second and third appellants have purportedly refused to provide copies of the audited accounts and company resolution to the respondent

[62] When the respondent's requests for the audited accounts and company resolution were purportedly rejected by the appellants, the respondent lodged a report with the Companies Commission of Malaysia ('CCM') to investigate the first appellant. As a result of the inquiry and investigation by CCM, an argument ensued between the respondent and the second appellant, which result in the respondent lodging a police report.

[63] It is to be noted that in response to the respondent's solicitor letter request for documents dated 15 September 2017, the appellant's solicitors letter dated 26 September 2017 had stated, inter alia, that the audited reports and companies' resolutions would take 30 days to prepare and will be subject to printing charges.

[64] The respondent's solicitor only responded two months later, via a letter dated 6 December 2017 to dispute the printing charges. It is to be noted that the respondent did not dispute the appellants' willingness to cooperate and provide the requested documents. The respondent's solicitors had only collected the requested company resolutions on 9 February 2018.

[65] Based on the above facts, we are of the considered opinion that it is obvious that the appellants had never refused to provide the requested company documents to the respondent. In any event, the respondent's solicitors have already collected the requested company resolutions even before the filing of the petition and we agree with the appellants that the respondent's attempt in raising this issue clearly lacks good faith.

[66] Further, we agree with the appellants that a purported refusal to provide company documents by itself is insufficient to justify winding up a company when the respondent could have availed himself to an application under s 245 of the CA 2016 to inspect the accounting and other records of a company.

[67] In any event, even if it is wrong for the director to deny the respondent access to the company documents, we find that the same is not a ground to wind up the respondent. In *Tan Keen Keong v Tan Eng Hong Paper & Stationary Sdn Bhd & Ors* where the Federal Court held that:

> the wrongs of the directors cannot, unless they fall within some ground in s 218(1), be ascribed to the companies themselves to thence form the basis for the companies themselves to be wound up. That would amount to 'an overkill'; almost deploying a 'sledgehammer remedy' to deal with matters outside the intent of s 218(1) (see *Tahansan Sdn Bhd v Tay Bok Choon* [1985] 1 MLJ 58; [1984] 2 CLJ 224; [1984] 1 CLJ Rep 383).

Respondent had been removed as a director from the first appellant

[68] It is not in dispute that respondent had been removed as a director by way of identical resolutions dated 16 January 2018 in all of the related companies, including the first appellant. It is the contention of the respondent that his removal as director of the first appellant and the related companies has resulted in a total loss of confidence in the second and third appellants in managing the affairs of the first appellant and the related companies for the benefit of the members as a whole.

[69] However, we agree with the case of *Wong Ah Chau v WBW Engineering & Construction Sdn Bhd* [2015] MLJU 479 that in order to assess whether it would be just and equitable to wind up on grounds of alleged deadlock, it is essential for the court to consider who has in actual fact had caused the deadlock.

[70] The appellants took the position that it was the respondent's own misconduct that led to the breakdown of confidence amongst the parties. Sometime around late 2016 to early 2017, the respondent had on his own accord engaged and/or appointed Pembinaan Nilai Setia Sdn Bhd ('Pembinaan Nilai Setia'), a company owned by his brother, Lim Kok Seng and his wife (June Wong Mei Ling), to carry out certain renovation works for first appellant, TNL Plastic and HSL Chemical.

[71] The appellants then discovered that the respondent had approved payment vouchers to make overcharged payments to Pembinaan Nilai Setia without verification or comparing the invoices issued with the renovation works actually done. As the respondent and Pembinaan Nilai Setia were unable to provide any justification on the amounts charged, the appellants had refused to make further payments to Pembinaan Nilai Setia which resulted in Pembinaan Nilai Setia bringing an action against TNL Plastic, Ho Shen Lee and HSL Chemical for recovery of the same in the Shah Alam Magistrates Court.

[72] The related companies had, in its defence and counterclaim, contended, amongst others, that the respondent had conspired with Pembinaan Nilai Setia to injure to related companies' image and reputation which amounted to a breach of the respondent's fiduciary duties.

[73] It is to be noted that the magistrate court, in dismissing Pembinaan Nilai Setia's claim and allowing the related companies' counterclaim against Pembinaan Nilai Setia and the respondent, had specifically made a finding of fact in its grounds of judgment that the respondent had conspired with Pembinaan Nilai Setia to defraud and injure the related companies, which are

as follows:

> [36] ... Defendan Kedua (LSL/respondent) telah menandatangani invois-invois dan baucer-baucer pembayaran berjumlah RM151,885.87 walaupun paintif (Pembinaan Nilai Setia) tidak mengemukakan maklumat-maklumat dan/atau butiran-butiran terperinci mengenai status keria-kerja pengubahsuaian dan dokumen sokongan yang jelaslah satu tindakan mala fide memandangkan pengarah syarikat plaintif terdiri dari ahli keluarga dan isterinya sendiri. *Tindakan defendan kedua yang menyemak invois dan meluluskan baucer pembayaran tanpa justifikasi juga adalah tindakan yang bersubahat dalam menipu defendan-defendan*. Malahan, terdapat invois pembelian bahan-bahan atas nama Lim Shen Lee dan Lim Shen Lee Sdn Bhd namun telah dicajkan terhadap defendan pertama dan jelaslah defendan kedua mendapat manfaat dari transaksi tersebut. *Walaupun defendan kedua merupakan pemegang saham di dalam syarikat defendan-defendan namun tindakan defendan kedua yang membenarkan akaunnya digunakan untuk membeli bahan binaan adalah jelas tindakan yang bersekongkol sedangkan defendan kedua sendiri mengatakan bahawa prinsipnya untuk tidak mencampuri apa-apa urusan yang melibatkan ahli keluarga dan/atau isterinya. Selain itu, tindakan defendan kedua yang telah pergi ke premis defendan pertama dan telah secara agresif menuntut bayaran bagi pihak plaintif adalah jelas menunjukkan defendan kedua lebih berpihak kepada plaintif berbandinq syarikatnya sendiri.* lni berdasarkan kepada rakaman CCTV dan terjemahan yang telah dikemukakan oleh pihak defendan-defendan. Tambahan pula, defendan kedua juga diwakili oleh peguam sama yang mewakili plaintif yang jelaslah menunjukkan konflik kepentingan.
>
> [37] Selanjutnya, mahkamah telah meneliti tindakan yang dilakukan oleh plaintif yang telah menuntut bayaran untuk kerja-kerja pengubahsuaian yang telah dijalankan dengan hanya mengemukakan tax invois tanpa sebarang butiran dan/atau maklumat terperinci mengenai status kerja-kerja pengubahsuaian adalah jelas satu tindakan mala fide. Plaintif juga telah menipu defendan pertama apabila menuntut lima bayaran bagi invois pembelian di atas nama Lim Shen Lee dan Lim Shen Lee Sdn Bhd. (Emphasis added.)

[74] The above findings of the magistrate court was affirmed on appeals, by both the High and the Court of Appeal on 3 September 2021.

[75] In view of the actions of the respondent to conspire with Pembinaan Nilai Setia to defraud and injure the first appellant company and the related companies, and in order to prevent further losses and/or disruption to the first appellant's business and reputation, the appellants had no choice but to convene an EGM on 16 January 2018 to remove the respondent as a director of the first appellant and the related companies. The ordinary resolution to remove LSL as director was validly passed by majority vote during the EGM.

[76] As such, we are of the considered opinion that the removal of the respondent as director is a management decision of the majority members of the first appellant and is in compliance with the law and CA 2016. Added to

that, the respondent had failed to come to court with clean hands in light of the breach of his fiduciary duties in conspiring with Pembinaan Nilai Setia Sdn Bhd to defraud and injure against the first appellant, which justified and necessitated his removal as director. Further, the respondent's misrepresentation to the banks had caused a freeze upon the first appellant's bank accounts, which caused a disruption in its daily operations.

[77] In the premise, we are of the considered opinion that there is no evidence whatsoever to support the respondent's allegation that there has been a total loss of confidence in the conduct and management of the affairs of the first appellant company as a result of him being removed as director and the appointment of the third appellant as a director. In fact, it was the respondent who had caused the loss of confidence due to the breach of his fiduciary duties in conspiring with Pembinaan Nilai Setia Sdn Bhd to defraud and injure the first appellant.

[78] The respondent further submits that based on the cumulative grounds in the petition, there had been a total loss of confidence and irretrievable breakdown of the relationship between the respondent and the second appellant, the third appellant and TM Wong.

[79] However, we are of the considered opinion that there is no evidence of an actual breakdown in mutual trust and confidence such as that would render it just and equitable for this court to wind up the respondent. Lord Shaw of Dunfermline in *Loch v John Blackwood Ltd* [1924] AC 783 at p 788 had stated as follows:

> It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. *But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business.* Furthermore *the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company*. On the other hand, *wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs,* then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

[80] We find that there is no evidence before this court of any dishonesty or lack of probity shown to have been committed by the directors of the first appellant in the running of its business. As such, it cannot be said that there is a breakdown in mutual trust and confidence between the respondent and the second and third appellants.

Refusal to buy the respondent's 46% shares

[81] The respondent has made a proposal to sell off his shares in the related companies to the second appellant and TM Wong for a sum of RM15m. This was rejected by the second appellant and TM Wong. A second offer was made at RM8.8m. However, the second appellant and TM Wong had rejected the same alleging that it was overpriced.

[82] The respondent took the position that since the second appellant and TM Wong are aware that the respondent can no longer work together with them, the respondent is willing to part off with the related companies by selling his shares. As such, the acts of the second appellant and TM Wong to reject the respondent's offers and not making a counter offer clearly shows the intention of the second appellant and TM Wong to oppress the respondent as a minority shareholders.

[83] The respondent's contention was accepted by the learned judge who made a finding in paras [28] and [29] of his grounds that the second appellant and TM Wong's refusal to buy out the respondent of his shares in the related companies was to pressure the respondent, '... lebih-lebih lagi antara pempetisyen dan responden kedua dan ketiga tidak boleh duduk bersama untuk berunding dan berkerjasama'.

[84] However, the second appellant took the position and had suggested that the value of shares should be based on the audited accounts of the related companies instead. As such, the second appellant had rejected the respondent's offer as there was no proper valuation, resulting in the offered price far exceeded a fair valuation of the respondent's shares in the related companies. As such, we are of the considered opinion that without a proper valuation, the second appellant and TM Wong were justified in their rejection of the respondent's offer as the respondent's selling price for his shares in the related companies were entirely exorbitant and baseless.

[85] Therefore, we are of the considered opinion that the learned judge had failed to give sufficient judicial appreciation of these facts and came to an erroneous conclusion.

COMPLAINTS/GROUNDS IN THE PETITION WERE NOT ESTABLISHED

[86] Based on the reasons enumerated above, we are of the considered opinion that the respondent has failed to establish any of the grounds in the petition, either individually or cumulatively, in order to invoke the court's discretion to issue the winding up order against the first appellant company

pursuant to s 465(1)(f) and (h) of the CA 2016.

[87] We find that the learned judge has made a fundamental error when he failed to ascertain whether the grounds in the petition had been established that warrants a winding up order. Instead, the learned judge narrowed down to the appellants' objections without first ascertaining whether the respondent, as the petitioner had established his case against the appellants in the petition. It is only after the petitioner has established his case to wind up the company that the judge will look at the appellants' objection against the winding up order. Thereafter, the judge will then weigh all the relevant evidences before he exercises his discretion as to whether she/he would issue a winding up order under s 465 of the CA 2016. The Supreme Court in the case of *Morgan Guaranty Trust Co Of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95; [1991] 1 CLJ Rep 317; [1991] 1 CLJ 260 had emphasised that the court must consider all evidence and determine whether it should exercise its discretion to order winding up or not.

APPELLANTS' OBJECTION AGAINST THE WINDING UP ORDER

[88] For the sake of completeness, we will now deal with the two issues raised by the appellants which were rejected by the learned judge:

> a) bahawa pentadbiran syarikat berjalan lancar tanpa gangguan dan perniagaan berjalan juga baik. Sekiranya mahkamah membenarkan Lampiran 1 permohonan pempetisyen ianya akan menjejaskan mata pencarian pekerja-pekerja.
>
> b) Tomahan pempetisyen bersubahat dengan Pembinaan Nilai Setia untuk mencederakan syarikat responden.

[89] With regard to para (a), the appellants took the position that the first appellant company is still operating without any deadlock in management and the winding up of the first appellant company would affect the livelihood of the company's employees.

[90] It is the respondent's submission that the above grounds are not relevant consideration under s 465(1)(h) of the CA 2016, that is, within the ambit of the expression 'just and equitable'. This was accepted by the learned judge.

[91] The respondent relied on the case of *Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (M) Sdn Bhd*, where this court held at at p 681 (MLJ); at p 429 (MLRA):

> We are of the view that since the learned judge did not at all direct his mind to the settled principles and the relevant facts of the case, in particular the statement of S02, it tantamounts to a non-direction. And further, the learned judge in exercising his discretion had manifestly proceeded on a wrong ground, because on decided

authorities the fact that the company is an on-going concern and is capable of making profits has never been considered as a factor that falls within the ambit of the expression of 'just and equitable'. The same consideration goes for the fact of undue hardship to workers because practically all business enterprises must employ workers, whether many or few, who will in any event suffer undue hardship as the result of the winding up. In *Re Yenidje Tobacco Company Limited* [1916] Ch D 426, the company was wound up in spite of it continued to transact business and large profits were made. And in In *Re Westbourne Galleries*, the company though made good profits all of which were distributed as directors' remunerations nevertheless was wound up."

[92] However, we agree with the appellants that *Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (M) Sdn Bhd* is distinguishable because this court had found that the High Court judge had wrongly exercised his discretion not to wind up the company on the sole ground that the company was an ongoing concern and capable of making profits with undue hardship to workers without considering other established facts which supported the petition to wind up the company.

[93] This is not the case in this appeal, as the respondent had failed to establish the grounds to justify a winding up order and that since a winding up is a drastic remedy of last resort, the respondent must establish a particularly strong case in order to wind up the first appellant, which is a successful and an ongoing concern.

[94] In *Foo Yin Shung & Ors v Foo Nyit Tse & Brothers Sdn Bhd*, Justice Peh Swee Chin dismissed the petition after making a finding that the petitioner has failed to prove the complaints within s 218(1)(f) or s 218(1)(i) of the CA 1965:

None of the complaints had been proved to my satisfaction so as to bring in the operation of s 218(1)(f) or s 218(1)(i). *Assuming that they were proved, none of such complaints, could be sufficient to amount to any infringement of the rights of the petitioners under the 2 grounds*. Assuming further that the transactions set out by the petitioners were such infringements, the extent of such infringements, or to be more precise, the extent of such unfairness or unjustness etc was not such as to induce the court to exercise its discretion to order a winding up of the company. *The company, though not a dynamic one, was nonetheless, having regard to undisputed allegations, a prosperous and successful one*. (Emphasis added.)

[95] In the case of *Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508, this court has held that the court will not wind up a company when its substratum is still intact:

[72] Though I believe that the appellant has lost confidence with the first and second respondents and vice versa I am of the opinion that the substratum of the

company is still intact. The company continues to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise there is no reason why the court should order it to be wound up or force one shareholder to buy out the other just because one does like the other. Without the appellant as a director, API is relatively speaking, well managed and this is manifested by the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances, there is no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the demands of the appellant particularly when there is cogent evidence that he did not come with clean hands — see *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at p 507.

[96] This decision has been recently followed by this court in the case of *Litar Sistem Adilkap Sdn Bhd v Lee Teak Hock & Anor* [2020] 5 MLJ 43; [2020] 7 CLJ 84 where it was further held that 'A viable solvent company assists the economy of a nation. It provides jobs for its employees especially in the present trying times. For this reason too the appellant should not be simply wound up' and that the winding up of a company should be a remedy of the last resort.

[97] On the factual matrix of this appeal, the appellants had established that the first appellant is a reputable and well-established company which obtained amongst others, the Singapore Green Label from the Singapore Environment Council, the Sin Chew Business Excellence Awards 2016 for Product and Service Excellence as well as fulfilling the International Standard in Quality Management System of ISO9001:2008.

[98] Added to that, in 2008, the appellants had launched a series of new products for the first appellant and had participated in the 19th International Architecture, Interior Design & Building exhibition 2018 at Kuala Lumpur Convention Centre to promote and publicise the first appellant's profiles.

[99] Further, the livelihood of about 100 employees of first respondent and the related companies, ie TNL Plastic and HSL Auto is dependent on the first appellant company maintaining its operations. In fact, even after the filing of the petition, the first appellant was still able to gain a profit before tax of RM3,943,729 for financial year end September 2018, which shows that Ho Shen Lee is financially viable and able to function with no deadlock.

[100] Finally, the true minority shareholder in this case, namely TM Wong who only holds 3% shares, has no complaint and in fact had at all material times agreed with the decisions of the appellants and approved the decisions that were complained of by the respondent.

[101] With regard to issue (b), the learned judge made the following finding:

> [30] Alegasi terdapat pakatan antara pempetisyen dengan syarikat Pembinaan Nilai Setia [PNS] tidak dapat dibuktikan oleh responden-responden ianya hanya alegasi semata-mata. lni berdasarkan bahawa pempetisyen tidak mempunyai apa-apa kuasa dan kepentingan di dalam syarikat PNS itu. Beliau bukannya memegang apa-apa saham dan bukannya Pengarah syarikat PNS tersebut.

[102] The above findings by the learned judge failed to take into consideration that the magistrate court has made a specific finding of fact in its grounds of judgment that the respondent had conspired with Pembinaan Nilai Setia to defraud and injure the related companies. Added to that, the findings of the magistrate court had been affirmed on appeals, by both the High Court and Court of Appeal on 3 September 2021.

[103] Apart from conspiring with Pembinaan Nilai Setia to defraud and injure the related companies, including the first appellant, the respondent had also acted against the interests of the first appellant by issuing a notice to CIMB Bank, which caused the bank to freeze the accounts of the first appellant. We are of the considered opinion that such acts/actions of the respondent are evidence of the respondent's lack of good faith in filing the petition.

[104] Section 465(1)(h) of CA 2016 has provides that the court may order the winding up of a company 'if the court is of the opinion that it is just and equitable' to do so. Under this provision, it is trite that he who seeks equity must come to court with clean hands, as held by the High Court in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 as follows:

> In my judgment, whether a winding up order should be made is a matter within the discretion of the court. In *Ebrahimi*, Lord Cross said (at p 387 of the report):
>
> > *A petitioner who relies on the 'just and equitable' clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue.* (Emphasis added.)

[105] In the case of *Eng Man Hin @ Ng Mun Heng & Anor v King' s Confectionery Sdn Bhd & Ors* [2006] 4 MLJ 421, the High Court had dismissed the winding up petition on the ground that the whole basis of the petition was predicated on the petitioners' own unclean conduct, as follows:

> This is a case where the petitioners are trying to make a mountain of alleged inequities out of a molehill. The allegations are made in an attempt to wind-up the company under the just and equitable provision of s 218(1)(i) of the Companies Act 1965. *The petitioners have failed to discharge the burden of proof that there is a violation of their equitable rights or any established equitable principle as to why they are not*

> *bound by the company's articles of association.* They have also failed to prove the existence of the legitimate expectation, the breach of which forms the basis of their petition. The facts show that the petitioners' complaints relate to actions taken by the respondents for the benefit of the company due to the petitioners' own conduct. *The petitioners are therefore the cause for the actions taken. As a result, the petitioners are not entitled to seek the aid of this court's equitable jurisdiction because they have not come with clean hands*. (Emphasis added.)

[106] Based on the grounds/complaints raised in the petition and after considering all of the above facts, we are of the considered opinion that the respondent has failed to come with clean hands before this court seeking to wind up the first appellant.

CONCLUSION

[107] On the issue of appellate intervention, in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, this court held as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[108] However, based on the reasons enumerated above we are of the considered opinion that there is indeed a need for appellate intervention in this appeal. We find that the decision of the learned judge was plainly wrong and cannot be upheld. The appeal was therefore allowed and we set aside the winding up order of the High Court with costs.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh